2001

The State of Utah v. Leland Facer and Robert W. Shields : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

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THE STATE OF UTAH,	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	Case No. 14251
	)	
LELAND FACER and ROBERT W. SHIELDS,	)	
	)	
Defendant-Appellant.	)	

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DEFENDANT-APPELLANT'S BRIEF

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Appeal from the Judgment and Sentence
in the District Court of Salt Lake County
Honorable Peter F. Leary

Richard J. Leedy, Esq.
744 East Third South
Salt Lake City, Utah 84102
Attorney for Defendant-Appellant

Stephen Randle, Esq.
Assistant Attorney General
State Capitol Building
Salt Lake City, Utah
Attorney for Plaintiff-Respondent

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DISPOSITION IN LOWER COURT

The defendant was convicted of violating 61-1-1 Utah Code Ann. (1953), (a stock fraud) and sentenced to three years in prison in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

The defendant seeks a reversal of the conviction and sentence and dismissal of the charges or, in the alternative, remand for a new trial.

STATEMENT OF THE CASE

The facts of the case are not in dispute.

The defendant in this action, Leland Jack Facer, was a heavy trader in the over-the-counter stock market. During the time in question, he was trading heavily in the stock of Great Northern Corporation, West Am Corporation, and Silver Gull Oil and Gas. The defendant, Mr. Facer, traded at various

brokerage houses, some of whom are claimed to be victims in this case. Mr. Facer also traded, not only in his own account, but in accounts of other or in what was called during the course of the trial, "nominee accounts." Mr. Facer was executing what was known as locally as "float trades" or by the Securities and Exchange Commission as "wash trades". A "float trade" or a "wash trade" is essentially a sale by a person through one brokerage house wherein he collects cash immediately upon the sale and the purchase of that same stock by that same person in another brokerage house wherein the person has approximately seven days within which to pay for the sale. In essence, the person executing a "float trade" has secured himself a very short term loan where an interest rate is equal to the brokerage commission for executing the trades.

The scheme as alleged by the prosecution in this action is that the defendant, Jack Facer, would execute these so-called "float trades" by selling stock at Continental Securities, a brokerage firm in Salt Lake City and purchasing that same stock through various other Salt Lake brokerage firms including M. L. Fallick and Company, Mountain States Securities, Inc., Heymond-Christiansen, Inc., Edward J. Mawod and Company and Union Securities, Inc. The prosecution contends, as was admitted by the defendant, that he collected cash upon the day of sale from Continental Securities but had seven days

within which to pay for the purchases at the above mentioned brokerage firms. The purchases that were made at the above mentioned brokerage firms were made in "nominee accounts" which the prosecution contends were also victims of the so-called "scheme". The named victims in such a category were William Birkinshaw, James Xarthos and Clifford Hughes.

Although it is unclear from the face of the information exactly how the defendant was alleged to have schemed to defraud the so-called victims, the bill of particulars accompanying the complaint outlined a plan alleged to have constituted a scheme to defraud. That bill of particulars is found in the record on pages 37 through 53. In essence the bill of particulars contends that the defendant set up these "nominee accounts" for the purpose of deceiving not only the persons whose names were being used, but also the brokerage firms wherein such accounts were used. For example, the allegations are that the account of James Xarthos and Clifford Hughes were used by the defendant at Mountain States Securities when in fact neither James Xarthos nor Clifford Hughes knew that their names were being used and that Mountain States Securities did not know that James Xarthos and Clifford Hughes were not in fact using their account. According to the prosecution, the defendant would execute sale through Continental Securities, collecting cash on the day of the sale, and execute purchases through the other named brokerage houses

through the various nominee accounts. While such has not been denied by the defendant, the purpose for his doing so was contested. The prosecution claimed that the purpose was two fold: (1) To manipulate the stock market; and (2) to victimize the brokerage firms and nominee accounts by not paying for the purchases when they were due and they alleged the defendant never intended to pay for said purchases at the time the purchase order was placed. Finally, the prosecution alleged that as a part of a scheme to defraud, the defendant did deliver insufficient funds check as payment for the accounts wherein the purchases were made.

The defendant, on the other hand, admitted that he had used "nominee accounts" but asserted that both the brokerage firms in fact knew that the accounts were nominee accounts of his and that the persons whose accounts were being used knew and had given permission for him to use those accounts. While the defendant admitted the "float trades" - the sales at Continental Securities and purchases through other brokerage firms of the same stock - the defendant asserted affirmatively that the reason for so doing was two-fold: (1) To create short-term loans to himself, so he could pay for stock he had previously purchased; and (2) to purchase stock that he hoped was increasing in price but he did not in fact have the money so to do and when it came time to pay for said stock he was required to sell other stock to raise funds for the earlier

purchase and, still wishing to retain said stock, would purchase the same stock that he sold at different brokerage firms. While the defendant acknowledges that his wife's checks were used to pay for the purchases when there was insufficient funds to cover said checks, the defendant asserted that such was done without his knowledge and while he was out of town and the brokers never did anything in reliance on said checks.

Charges were brought originally against four defendants and included two separate complaints totalling twelve counts against each defendant.

Prior to the preliminary hearing, the prosecution had given immunity to one of the defendants to testify against the remaining defendants; at the preliminary hearing all counts were dismissed as to the defendant's wife, Barbara Facer, and the defendant Jack Facer and the defendant Robert Shields were bound over to trial on one count of stock fraud while the remaining eleven counts were dismissed. Shortly prior to the trial, the prosecution gave immunity to Robert Shields so that he would testify against the defendant on the one count remaining. So of the 48 felony counts that were originally brought, one went to trial.

ARGUMENT

POINT I

THE TRIAL COURT FAILED TO PROPERLY INSTRUCT THE JURY AS TO THE ELEMENT OF RELIANCE IN A STOCK FRAUD ACTION.

In accordance with the Utah case of S & F Supply Company vs. Hunter, 527 P.2d 217 (1974) the defendant requested proposed jury instructions on the element of reliance. The Utah Supreme Court in S & F Supply Company, supra, stated:

> "As was correctly observed, by the Second Circuit Court, . . . 'some form of the traditional scienter requirement' . . . is preserved . . . whether it be termed lack of diligence, constructive fraud, or unreasonable or negligent conduct, . . . [that] . . . standard . . . promotes the deterrant objective of the rule." (Citing S.E.C. vs. Texas Gulf Sulfur, 2 Cir., 401 F.2d 833, 854-855. and S.E.C. vs. Capital Gains Bureau, 375 U.S. 180 192-193, 84 S.Ct. 275 11 L.ed. 2d 237).
>
> "Correlated to the above, it has also been said that this statute does not require the buyer to prove the element of his own reliance on the false representation. It is true that the statute does not expressly so state. But all of the law cannot be written in one sentence or in one statute. Thus, in any other statute, must be considered in its relation to the total fabric of the law and be so interpreted and applied as to be consistent with the common sense, and with elemental principles of justice. It follows that the statute cannot be fairly be understood in meaning that a buyer can naively or blindly purchase stocks without concern for the truth or reasonableness of representations made, then if it later develops that it would serve this interest, assert a claim of falsity of that representation about which he previously had no concern, and upon which he placed no reliance, as a basis for avoiding his contract."

In accordance with such statement, the defendant requested the following proposed jury instruction: Defendant proposed that Instruction No. 6:

> "Members of the jury, you are instructed that the prosecution has charged that the above mentioned victims were deceived by the plan or artifice described above, that they relied on said plans to their detriment. If

you fail to find such beyond a reasonable doubt, then you must find the defendant not guilty". (RT-121).

Also, the defendant's proposed Instruction No. 8 which was refused by the court, reads as follows:

> "Members of the jury, you are instructed that in order to convict the defendant you must find from the evidence beyond a reasonable doubt that the above conduct by the defendant constituted a scheme, artifice or device and that the defendants did wilfully and intentionally execute that scheme or device for the purpose of defrauding the above named victims and that the above alleged victims were in fact defrauded and did rely on said scheme to their detriment. If you fail to find beyond a reasonable doubt from the evidence that any of the above was true, then you must acquit the defendant." (R-123).

Also, the defendant's proposed Instruction No. 13, which was refused by the Judge, read:

> "Members of the jury, you are instructed that the requirement of defrauding is defined to mean that the plan, or course of conduct was used for the purpose of deceiving certain enumerated victims by having them rely thereon to their detriment."

The prosecution's theory was that the purchasing brokerage firms did not know Jack Facer was selling at Continental Securities nor did they know he was buying at their brokerage firms because he used nominees. In essence, the charge is he ommitted to tell the "victims" he was on both sides of the transactions and they were relying on him not being both the seller and the buyer.

It is the defendant's position that the element of "reliance" is an integral part of the crime of scheming to defraud and that failure to so instruct was prejudicial error. There is ample evidence in the record from which the jury could have found, if they had been instructed that the enumerated victim did not rely upon the misrepresentations, omissions or conduct of the defendants.

With respect to the question of "float trades" the so-called victim Mawod testified:

Q. I believe it was your previous testimony that a "float trade is a common practice in the Utah brokerage industry, isn't that correct?

A. I don't know, it would happen quite often in this area, what would be regarded as common practice, the drawn line or not, I don't know.

Q. Isn't it true that the purpose for such a practice, I believe your testimony was, was to raise short-term cash?

A. Yes sir. (RT-65)

Mr. Howard Morgan, an agent and trader for the so-called victim M. L. Fallick & Company testified at (R-215) (RT-215).

Mr. Randall:

Q. Mr. Morgan, did you execute any directed trades for Mr. Facer?

A. Yes.

Q. What did that consist of?

A. Well, we had a settlement date, we needed the cash and he needed to raise funds. He would tell me to buy some stock in one account and buy from another broker.

Q. And did he tell you the market price or anything of that nature?

A. Yes.

Q. And when you did those trades did you always find the stock available?

A. Yes.

Q. What companies were you directed to trade at?

A. Continental Securities, Union, Kesco, Trans American, several brokerage houses.

Q. Did you have any knowledge at all about whether or not Jack Facer might have been on the other side of these trades?

A. Well, I assumed he was, let's put it that way. There's no way I would have actually known of this. (RT-233).

On cross-examination the trader for Fallick testified:

Q. Mr. Morgan, if I can paraphrase your testimony, let me ask you if you did testify that at the end or - the question was, did you execute directed trades for Mr. Facer and you indicated at the end "we had a settlement date, we had to meet and he didn't have funds so we did "float trades", is that a correct statement of your testimony?

A. I didn't mean - I mean there were trades, there were settlement dates that were due and in order to take care of this Mr. Facer would do directed trades, yes.

Q. And you knew about it?

A. Sure.

Q. And it didn't deceive you at all that he was doing it?

A. That's the only way we had to get the money, he didn't deceive me.

Q. As a matter of fact, he took the money that he got on the cash end and brought it over to M. L. Fallick & Company to pay for the earlier trades?

A. Correct. (RT-237-238).

Shortly thereafter, Mr. Morgan testified:

Q. But you do know while you were an employee of M. L. Fallick & Company that these were in fact "float trades"?

A. I would say that they were directed trades to raise money to pay for other trades.

Q. And M. L. Fallick & Company got the money?

A. Some of the money.

Another so-called victim, William Birkinshaw, who was also an agent for the alleged victim Union Securities testified:

Q. Did you become aware that he (Jack Facer) was both buying and selling significiant amounts of Great Northern, Silver Gull and West Am?

A. You are talking about the initial time of my acquaintance with Mr. Facer?

Q. No, through the series of meetings in the morning?

A. Oh, I later found out certainly that he was trading. He was buying and selling.

Q. Did you ever have any occasion to find out if Mr. Facer was doing any cross trading or "float trading" or whatever you would want to call it?

A. Well, toward the latter part.

Q. Before the checks bounced, did you become aware that he was "float trading"?

A. Yes, I know that he was a buyer and seller.

Q. How long before the checks bounced did you learn this?

A. Oh, a month. (RT-255)

On cross-examination he testified:

Q. Isn't it true Mr. Birkinshaw that at one of your meetings in late March you sat down and discussed that there were settlement dates approaching and no one had any money?

A. You say, did I?

Q. Was that discussed at a meeting?

A. It could have been, I don't recall.

Q. And wasn't it also discussed that the man was to sell some stock to Continental to get cash to cover the settlement date and for you to buy it at Union Securities and for Howard Morgan to buy it at Fallick?

A. Could have been, yes. . .

Q. And isn't it true and a fact that the monies that were collected from those sales were taken up and given to Fallick, Mawod, Union Securities?

A. I don't recall.

Q. Do you remember this, did Mr. Jack Facer make any money off those "directed trades"?

A. I don't see how he could have.

Q. That's because all of the money was going back to Fallick and Mawod and Union, isn't that correct, and Heymond and Christiansen?

A. And other brokers may have been involved. (RT 277-278).

Another so-called victim was Clifford Hughes who was a customerat the so-called victim Mountain States Securities (the remaining individual victim was James Xarthos but he was deceased at the time of trial and so no evidence was introduced to be received as to Xarthos (RT 347-348). Mr Hughes testified:

A. He just asked if it was all right if he bought and sold stock through one of my accounts and I said yes. (RT-180) . . . If Mr. Facer called me on the phone and asked me to buy some stock at Mountain States Securities and directed them them to buy it from Continental Securities.

Q. When was that?

A. It was in the early part of 1973 . . . .

Q. What stock was that?

A. In Silver Gull.

Q. And did Mr. Facer instruct you at what price you were to obtain that?

A. Yes, he did. He said to buy it, it think at 11 cents or 8 cents or something, I will have to see the total confirmation, I don't remember the exact price, but he told me how much to pay for it and who to buy it from and I instructed Mountain States to do this and they called back very shortly thereafter and said they could buy some stock cheaper and I told them to go back to Continental and buy the stock that was ordered.

Q. And when they told you that they had bought it cheaper than what Jack told you to buy it for did you at that point call Jack and inform him of that fact?

A. Yes, I called him and told him because I thought it was funny.

Q. What did he say when you told him that Mountain States bought it cheaper?

A. He at that time had told Mountain States to go ahead and buy the other stock through Continental so it was just more or less a joke at that time.

Q. You had already informed Mountain States to go back in and buy it when Jack Facer told them at a higher price?

A. Yes.

Q. Would you tell Jack Facer that?

A. Yes

Q. What would he say?

A. Like I said at the time it had all been done, it was funny then.

Q. Why was it funny?

A. Well, just being able to buy it on the market cheaper than it would normally have been bought for.

Q. . . . Or you allowed him to use your account?

A. Yes, I do not believe there were any sales made in any account, just purchases.

Q. But also that was done fully with you knowledge?

A. Yes.

Q. And also this later transaction in Mountain States was done fully with your knowledge?

A. Yes. (RT-189).

It seems clear from the evidence that Mr. Facer did not deceive any of the so-called victims through the use of "float trades." The prosecution's theory; i.e., that the defendant Facer omitted to tell persons material facts; that he was the seller on the other side of purchases; simply does not hold water when weighed in view of the evidence. At least, Mr. Facer should have obtained a proper instruction as to the law of reliance because if in fact the so-called victims did not rely on the

omission that he was on the other side of the sale, then Mr. Facer should have been acquitted of the charge.

It was also the prosecution's theory that the use of nominee accounts was deceiving to both the nominees used and the brokerage firms at which the nominees were used. In essence the theory was that the brokerage firms were relying upon these individual persons and did not in fact know that Mr. Facer was behind these accounts. Again, in view of the evidence, such holds very little weight: Mr. Morgan, the agent of M. L. Fallick & Company testified:

> Q. You indicated you did several trades for Mr. Facer in these nominee accounts, is that correct?
>
> A. That's correct.
>
> Q. Did he at any time try to deceive you in any way or manner by saying they weren't his accounts?
>
> A. No.
>
> Q. It was fully disclosed and you weren't defrauded in any manner by using nominee accounts?
>
> MR. MCCARTHY: Objection.

Mr. McCarthy's objection to the word defraud was sustained.

> Q. You were not deceived by his use of nominee accounts?
>
> A. I would say no, I wasn't.

And Mr. Mawod, the principal of Edward J. Mawod & Company testified:

> Q. And in addition to the "float trades", Mr. Mawod, was the use of nominees pretty common practice in the Utah brokerage industry?
>
> A. Yes. (RT-65).

Mrs. Fallick, the principal of M. L. Fallick & Company also testified she knew Mr. Facer controlled the accounts (RT 120-121).

And at Union Securities the agent for Union established the nominee accounts for Facer. Bill Birkinshaw, a broker at Union and a so-called victim testified:

> Q. All right, in your representation of Mr. Facer at Union Securities, did you have occasion to set up other accounts for him other than in his own name?
>
> A. I don't recall whether his wife had an account but throughout the business with Mr. Facer we used nominee accounts . . . .
>
> Q. All right, can you remember the nominee accounts you established for Mr. Facer?
>
> A. These were my accounts that gave permission for me to execute trades as long as they were paid for, now we used Duane Day, Stan Nelson, Don Dorton and I think it was Stuart Sargent, but that's all I could recall, there could have been more.
>
> Q. But all of those individuals gave you permission to use their accounts?
>
> A. I asked them for permission prior to the first trade in each case.

It seems difficult in light of the above testimony for the prosecution to contend that Mr. Facer's use of nominee accounts deceived both the nominee and the brokerage firms at which the accounts were used. However, at least the jury should have been instructed regarding the matter of reliance. If, in fact, the brokerage firms were relying on these individual nominees as having placed their own orders and intending to pay for them rather than their being used simply as nominees, then a case could be made. However, in view of the above testimony, they could not reasonably conclude beyond a reasonable doubt that such was the case, particularly if the jury had been so instructed.

The final part of the so-called scheme was the use of insufficient funds checks to pay for the purchases in the various brokerage accounts. It should be pointed

out that the testimony was almost unanimous that the defendant Jack Facer was not in town at the time the checks were issued but the checks were not on his account, but on his wife's, that the so-called victim Bill Birkinshaw and Robert Shields obtained the checks from Mr. Facer's wife and negotiated them without Mr. Facer's knowledge and while Mr. Facer was out of town. (RT-285) (RT 278-279) (RT-239-240).

Further, no consideration passed at the time the insufficient funds checks were delivered and, therefore, they could not possibly have been fraudulent in and of themself from the classical sense. (See e.g. RT-70, 150). The checks were delivered some seven days after the purchases and nothing was delivered to the customer at the time he delivered his check. Even assuming that the defendant executed the checks and assuming that he delivered the checks, and assuming that he was in town at the time the checks were negotiated and assuming that the checks were on his account, and assuming that proceeds were delivered by the brokers at the time the checks were tendered, it is the defendant's position that the same would still not be fraudulent as the brokers who acquired said checks knew, at the time they acquired them, that there may not be sufficient funds to cover the checks. Mr. Birkinshaw, the broker at Union Securities, a so-called victim, and Mr. Birkinshaw himself was alleged to be a victim, testified as follows:

Q. And isn't it true in a particular period of time when settlement dates came up and Mr. Facer was out of town in Las Vegas, Nevada?

A. Yes, he would have been out of town towards the middle or first week of April as I recall.

Q. And isn't it true that at that particular time both you and Mr. Shields got together and separately went to Barbara Facer and got some checks from her that were signed in blank?

A. This I don't recall.

Q. Isn't it true that some of those checks that you obtained from Mrs Facer were delivered to Union Securities?

A. I delivered settlement checks to Union Securities from Barbara Facer, yes.

Q. And you knew fully well there were insufficient funds to cover those checks?

A. All of the checks?

Q. The checks that bounced at the end that were part of this law suit.

A. I had no way of being positive because I didn't have their account at First Security Bank. How would I know?

Q. You're hedging a little, you though there were insufficient funds.

A. I thought there was a possibility that the checks may not be good at the time they were cashed.

Q. You asked Carl Seljaas to take one of those checks to take it into Union Securities because you were too embarrassed because you knew there were insufficient funds.

A. I don't recall making that statement to Mr. Seljaas.

Q. Is it possible that you could have been?

A. Possible.

In order for a scheme to be fraudulent, there must be some intent at the time the misrepresentations were made or that a course of conduct was indulged in that the victim should rely on such. (S & F Supply Company v. Hunter, 527 P.2d 127 (1974)). The evidence in the instant case is such that the jury could have found that none of the victims relied on the course of conduct, misrepresentations or omissions

nor did the defendant intend that they do so. In such a case the defendant should have been acquitted. However, as the jury received no instructions on the elements of reliance, a jury verdict in favor of the defendant on this basis would have been contrary to the instructions of the Court. Therefore, it was in error for the court to refuse proposed instructions concerning reliance. This Court has one of two alternatives: (1) They may either review the evidence as noted herein as showing that there was no possibility for reliance; or that the defendant intended the victims to rely and reverse the trial court and enter a judgment of acquittal or, (2) on the other hand, the Court may remand for a new trial in accordance with instructions concerning the element of reliance.

POINT II

THE TRIAL COURT COMMITTED ERROR IN REFUSING TO INSTRUCT THE JURY ON THE DEFENSE OF "UNCLEAN HANDS".

The evidence in this case as quoted above was replete and was pervaded with implications that the "so-called victims" were in fact, knowledgeably involved in all parts of the transactions. (See the testimony of Clifford Hughes quoted above and of Bill Birkinshaw and Howard Morgan, all quoted above.) There can be no doubt that these witnesses for certain knew all aspects of the "alleged scheme" and yet participated therein. However, the prosecution called these witnesses victims. The evidence and the testimony of the other so-called victims indicate that they may have been more aware of the situation than they would let on. The jury might well have found that the so-called victims were, in fact, involved in the scheme, if there was one.

The defendant requested a jury instruction:

> "Members of the jury, you are further instructed that the securities laws of the State of Utah are designed to protect the unsophisticated and unwary and that in order to be found guilty of the crime charged, the victims enumerated must not have been aware of or participated in the alleged scheme, plan or course of conduct.

The doctrine of unclean hands is a defense for stock fraud. See Cartier v. Button, CCH Par. 91, 540 (1964-1966) transferred (S.D.N.Y. June 8, 1965) Volume II, Bromberg Securities Law-Fraud, Page 253, Section 11.5 (1968) E. D.

If, in fact, the so-called victims were indeed knowing participants in the so-called scheme, if there was one, then the defendant should have been acquitted. The failure to so instruct the jury was prejudicial error when there was, in fact evidence from which the jury could have concluded that the victims did, in fact, participate.

POINT III

THE TRIAL COURT'S EVIDENTUARY RULINGS WERE, TO A LARGE PART, ERRONEOUS AND, IN SEVERAL PARTICULAR AREAS LED TO PREJUDICIAL ERROR.

The trial court, over objection of defense counsel, allowed the jury to hear evidence concerning the history and defendant's association with a company known as Great Northern. The evidence was objected to as irrelevant and remote as the prosecution was examining about events that occurred from the spring of 1972 through February of 1973. The information alleges a scheme which began on March 20 of 1973 and the defendant contended that his activity and relationship to Great Northern Corporation prior to that time had no relevance to the charge

before the jury. Additionally, such evidence was prejudicial and could have had a substantial influence of the jury in that it brought forth certain matters such as a proposed merger that was never accomplished and a Securities Exchange Commission ban on the trading in Great Northern stock -- the implication from such evidence was that somehow defendant was responsible for such. It was defendant's contention that all such evidence is irrelevant and remote in time from the charges filed but the objections as seen below may come on different grounds than these. In order to clearly bring such matters before the attention of the Utah Supreme Court, the following is an example of some such evidence and the objections thereto:

In examining Robert Shields, the following dialogue took place:

Q. Did you have occasion to see him (Jack Facer)in approximately August of 1972?

A. Yes, I did.

Q. And did you have conversation with him about that time concerning a stock by the name of Great Northern Corporation?

A. Yes, I did.

Q. And can you tell us where that conversation took place?

A. I believe it would have been at Ferraco's, downstairs Felt Building.

Q. In Salt Lake City?

A. Right.

Q. And who was present at that conversation if anyone besides you and Mr. Facer?

A. Himself and myself.

Q. Can you tell us what the conversation was?

MR. LEEDY: Objection, your Honor, on the grounds, its remote in time from the indictment.

COURT: Overruled.

Q. Go ahead and tell us what the conversation was that you were having with Mr. Facer.

A. He had the opportunity to buy stock in Great Northern Corporation and wanted to know if I was interested in some of the stock . . .

Q. Have you ever heard of the name American International Travel Service Incorporated?

A. I have.

Q. And does that have any connection with Great Northern Corporation, in any way?

A. Not that I know of other than it was to be.

Q. And how do you know that it was to be?

A. I had a conversation with Mr. Facer that if certain assets, certain things could be done and so forth this was a good clean company and the stock in that particular company and could be merged coming of three shares of A.I.T. to go into one share of Great Northern.

Q. So he brought up to you the possibility of merger between those two corporations.

A. There was a possibility of a merger, Right?

Q. And when did he mention that to you?

MR. LEEDY: Your Honor, can I object at this point, I don't understand how we were in American International Travel stock, it has nothing to do with the fraud that's going in this case. (RT-334).

COURT: Objection overruled. Lay a foundation.

MR. RANDLE: (further conversation) Yes.

(For some time after that examination centered upon American International Travel Service and a proposed merger with Great Northern Corporation.) While still discussing the proposed merger:

MR. LEEDY: If it please the Court, may I have a continuing objection to all testimony concerning American International Travel.

COURT: You may. (RT-335).

Continuing on:

Q. Why did you invest in American International Travel?

A. Well, because,

MR. LEEDY: Objection, irrelevant and immaterial. (RT-337).

Going back to the proposed A.I.T. merger Mr. Shields testified:

Q. So you were faced with the loss of how much then?

A. On what?

Q. On your A.I.T. stock in March of 1973.

A. The A.I.T. Stock would have to be some good, $40,000 loss.

Q. Mr. Facer wasn't faced with any of that loss, was he?

A. We never discussed it. (RT-339).

The proposed merger between Great Northern and American International Travel was never alleged in the indictment or in the Bill of Particulars. The time of the proposed A.I.T. merger was far remote from the time of the alleged scheme in the indictment. Mr. Shields, the person whose testimony was just quoted was not even alleged to be a victim. The defense can see in no way how such testimony relates to a proposed scheme with which the defendant is charged and in no way could be relevant or material, but was, in fact, prejudicial because of the loss that was suffered in the merger that never was accomplished.

Further pursuing the irrelevant proposed A.I.T. merger, the prosecution examined their witness Gilbert W. Barnes:

Q. And were you aware of the merger between American International Travel and Great Northern Corporation?

A. Yes.

Q. And, in fact, you were Jack Facer's contact in Las Vegas to arrange that merger? Were you not?

A. Jack Facer's contact?

Q. Yes.

A. No, I was a friend of Jay Finn's on that particular thing . . . I don't recall when the merger was, I don't know.

Q. Well the testimony here is that it was in early October of 1972, you don't recall even when it was? (This is some seven months prior to the allegation of fraud by the defendant Facer.)

Prosecution continued its examination of Gilbert Barnes regarding American International Travel with the vein of trying to prove that American International Travel was a "shell" corporation.

Again, it should be pointed out that American International Travel is not charged in the indictment nor named in the Bill of Particulars. The merger is not charged as being a part of a fraudulent scheme, the date of the merger is more than half a year prior to the date charged in the indictment and, obviously, the term "shell corporation" is designed for prejudicial effect. Examination (RT-445).

Q. Excuse me, did you at any time see any financial statement for Jay Finn's company at that time?

A. You mean did I see a financial statement for International Air Travel?

Q. Yes.

A. Well, I'm sure I would have looked at one.

Q. What were the assets of the company at that time?

MR. LEEDY: Objection, your Honor, he is testifying as to what is on the document is the best evidence.

COURT: Sustained.

MR. RANDLE: I show you what are entered into evidence as State's Exhibit 62 and ask if you have seen that document before.

A. I have.

Q. Is that some sort of due diligence that you sent up to Salt Lake . . .

(at that point a dialogue starts concerning the business of Great Northern Corporation).

Q. Isn't it true that American International Travel Company was an old inactive company that belonged to the Winstrom's?

A. No, sir, it is not true.

Q. Who did it belong to?

A. Originally?

Q. Well, just prior .

A. The Winstrom's have never owned it, so I don't know who all owned it through the history, but Winstrom's never owned it.

Q. Who were the stockholders in the company who arranged for the merger?

A. I talked to the officer of the corporation which is Carl Winstrom as president.

Q. He is president of the company?

Q. He doesn't own it.

Q. Well he was a stockholder, wasn't he?

A. Small stockholder.

Q. He had control of the company and arranged for whatever needed to be done for the merger didn't he?

A. He was the president of the Company. I wouldn't say he controlled and arranged it, he sent out stockholders' letters and had approval for what he did.

Q. You helped him do that, didn't you?

A. Yes.

Q. And you even went to the Secretary of State's Office and got the company reinstated, didn't you?

A. That was before it was American International Travel

Q. You changed the name?

A. Right.

Q. It was an old inactive company?

A. It was a mining Company.

Q. And it had some old mining claims in it, didn't it?

A. At one time it had operated mines.

Q. Did you have a mining claim when you were arranging for the merger?

A. I believe it still had some in there then.

Q. Other than those old mining claims, did it have any other assets?

A. Not to my knowledge.

Q. Just an old shell, wasn't it?

A. An inactive company for several years, it had been.

Q. And just prior to the merger you didn't put any assets in it, did you, didn't put any interest in it?

A. No. (RT-459).

Q. Did anyone?

A. I don't remember, I don't think so.

Q. And you had to go to the Secretary of State's Office to get the company reinstated, isn't that true?

A. I didn't get up there, I sent a letter.

Q. You were the one that arranged to have it reinstated?

A. I believe I paid for the filing fee and loan to the company to the best of my knowledge, $1,000.00.

Q. So if there was a merger between those companies it was a merger between two shells, isn't that a fact?

A. No, its not a fact. Great Northern is not a shell . . .

The prosecution continues to examine along the vein that American International Travel is a shell corporation.

Again with Mr. Birkinshaw, the prosecution takes the same tact as it did with Mr. Shields. First it discusses Mr. Birkinshaw's first meeting with Mr. Morgan, with Mr. Facer and the first contact with Great Northern Corporation. All of these are much prior to the time alleged in the indictment. On page 249 of the transcript Mr. Birkinshaw begins such testimony by discussing his introduction to Mr. Facer in a bar in Salt Lake City and conversation about Great Northern.

Q. And how did you meet Mr. Facer?

A. I was introduced to Mr. Facer by Howard Morgan.

Q. And where was that?

A. As I recall, it was at the Cabana Club.

Q. Did Mr. Facer have a conversation with you at that time concerning the stock of Great Northern Corporation?

MR. LEEDY: Objection, as irrelevant and immaterial, it's remote in time from the time charged in the information.

COURT: Objection overruled.

Q. Yes, just relate the conversation to us. . . Mr. Facer talked to you about the stock of the Company?

A. We dealt with the stock, yes.

Q. Well what did he ask you to do about the stock of the Company?

A. He wanted to know if perhaps I had brokers that might be interested in retailing the stock.

Q. Here in Utah?

A. No, out of state.

Q. He wanted you to retail the stock out of the state?

A. Well, he wanted to know if I could create an interest with brokers who might be interested in the retail of the stock. (RT-250).

None of this has relevance or materiality to the information and can only be prejudicial to the defendant Facer.

After the testimony just quoted the prosecution goes for quite some time into the history of Mr. Facer and Mr. Birkinshaw's dealings and also the history and business of Great Northern Corporation. Continuing on with the line of inquiry on RT-253 the prosecution is now at the year 1973 and asked questions:

> Q. Can you tell us what value of trading activity Mr. Facer was having to do, how it progressed through February and March.
>
> MR. LEEDY: Objection, calls for a conclusion.
>
> COURT: Rephrase it.
>
> MR. RANDLE: How many trades did you do per day for Mr. Facer during the month of February?

This period of time is some two months prior to the indictment. (RT-253).

> MR. RANDLE: We are talking about February 6, approximately when these stocks were suspended and I just want to know if Mr. Facer said or did anything during your course of dealing different than he had been doing at the time it was suspended.
>
> A. Not at that time, nothing different that I recall.
>
> Q. The volume of transactions that occurred that remained about same?
>
> MR. LEEDY: Objection. Leading.
>
> COURT: Sustained.
>
> A. I don't think they remained about the same.

Then the prosecution goes briefly into International Air Travel Service again (RT-282 - 283).

With the witness Howard Morgan, the prosecution attempted to elicit a trading history for the market price of Great Northern Corporation and attempted to show that the rise in that market price, even though the rise occurred prior to the

time alleged in the indictment (RT-220). And, also, into a history of the stock splits for Great Northern. For example:

Q. Can you tell us what the market activity in Great Northern did just before the time of the first split?

A. The stock went from $1.00 to, I can't remember, it went up.

MR. LEEDY: If it please the Court, I'm going to object unless there is a particular time period mentioned and that the period of time of the forward split was from March and April

Q. Can you set a time please?

MR. RANDLE: I think you said that the first split took place in September of 1972. The answer to that is correct.

MR. LEEDY: I'm going to object on grounds of relevancy then, your Honor.

Although the Court sustained that objection at that time, it later allowed testimony.

MR. RANDLE: All right, what was the stock selling for after the second spurt in December of 1972?

MR. LEEDY: Objection, unless we have a time period, your Honor, and if it's in September, I object on grounds of relevancy.

MR. RANDLE: I said in December of the second split.

COURT: Objection overruled. He may answer.

A. As I recall it was about $3.00 per share. (RT-223).

Q. Now what was the price activity after the second spurt to the time that the market was pretty much, well let's do it this way, I would like to offer at this time the public document.

MR. LEEDY: Objection on grounds of relevancy, your Honor . . .(Court overruled the objection R-224.)

MR. RANDLE: What was the market activity in Great Northern stock, the market price and the value of, you know from the date of the second split to February 6, when the stock was suspended . . . .

Q. Where was this conversation held?

MR. LEEDY: Your Honor, I am going to object now, we are

COURT: Objection is overruled. (RT-225).

A. In September, 1972, an agreement was made between Mr. Fallick and myself and Mr. Facer . . .

Q. Tell us the conversation.

A. The conversation was that he would .

MR. LEEDY: Again, your Honor, I am going to object on grounds that it is remote in time.

COURT: Objection will be overruled. (RT-225).

On redirect the prosecution again goes into the question of the incompleted merger with the shell corporation at a time more than half a year prior to the time alleged information.

Q. Who was Jay Finn?

A. He was the president of International Air Travel Service which was going to merge with Great Northern. .

Q. Prior to the merger do you know whether or not Great Northern would be anything more than a shell corporation . . . (RT-234).

Then an unaudited balance sheet was introduced into evidence over objection for foundation. (At the time the defense also had a continuing objection of relevancy as to any evidence regarding the company which was the prospect of the proposed merger.)

Q. Now in relation to your diligence work, did you at any time receive any financial statement from International Air Travel Service?

A. I recall there was a financial statement in the original due diligence package . . .

Q. I show you what has been marked for identification as proposed Exhibit 62, and ask if you can identify that document?

A. I can identify the first two pages.

Q. All right, what are they?

A. That's an unaudited balance sheet and financial statement for the period beginning January 1, 1972, through December 31, 1972, on International Air Travel Service.

Q. Have you seen those documents before?

A. Yes, it was part of a due diligence file.

Q. And they were presented to you by officers of International Air Travel Service?

A. I'm sure that's where they came from, they came in the mail as far as I know.

Q. Now this document that is filed in the due diligence file intended for public information as to what International Air Travel Service's assets and income were supposed to be for 1972.

A. Yes.

Q. And do you know if that was actually the document issued by the Company?

A. As far as I assume there are, yes. This comes in the mail all the time to brokerage houses, but financial statements which update the diligence packages. As I say, it was brought in the office and was dropped in my basket.

Q. I will offer at this time, your Honor, State's proposed Exhibit 62.

MR. LEEDY: Objection, no proper foundation. Can't see the relevancy as to this defendant, I can't see the relevancy as to the company. That's a company on International Air Travel Company.

The financial statements were for 1972, when the time in question is March and April of 1973, and, also, there was no evidence of who prepared the balance sheet.

COURT: Exhibit 62 will be admitted subject to a motion to strike.

Further, the prosecution elicited into evidence, over objection, from several witnesses, the fact that trading in the security of Great Northern Corporation had been suspended by the SEC in February, some two months prior to the time that the defendant

is charged with having engaged in a scheme to defraud. For example, the witness Howard Morgan testified:

> Q. Now what was the price activity after the second split from the time that the market was pretty much -- well let's do it this way, I would like to offer at this time a public document.
>
> MR. LEEDY: Objection on grounds of relevancy, your Honor.
>
> MR. RANDLE: This is duly exemplified and marked for identification as the State's proposed Exhibit 66, which is a certified copy of the order suspending trading of Great Northern stock issued by the Securities and Exchange Commission. I would like to offer that into evidence at this time. (RT-223).
>
> COURT: What is the date of this?
>
> MR. RANDLE: The date of the document?
>
> COURT: No, the date of the order.
>
> MR. RANDLE: The date of the order is February 6, 1973.
>
> COURT: Be admitted.
>
> MR. RANDLE: The date of this suspending of trade of Great Northern stock by the SEC was February 9, 1973. . .

The prosecution pursued the same matters with the so-called victim Birkinshaw.

> Q. Can you tell us what happened at the time great Northern stock was suspended by the SEC?
>
> A. Would you rephrase that please?
>
> Q. Can you tell me what happened with your transactions with Jack Facer at the time Great Northern stock was suspended by the SEC?
>
> Mr. LEEDY: Objection, irrelevant and immaterial, asking about a time that is a month before the time charged in the information.
>
> COURT: Overruled. . .

He pursued the same subject matter with the witnesses Robert Shields and Gilbert Barnes. (See, e.g. RT-357).

As with the questions dealing with the proposed but incompleted merger, the evidence about a Securities Exchange Commission trading suspension on Great Northern stock was completely irrelevant and immaterial to the time alleged in the information and had no bearing or connection with the alleged scheme or with the particular defendant, but would serve to prejudice him as the evidence was obvious that he was a man who was heavily involved in a stock which the government stopped from trading.

In another area of evidence, the prosecution dealt with aspects of the defendant's personal life which had again, no bearing upon his trading in the securities of West Am, Great Northern, or Silver Gull Oil and Gas during the period of time alleged in the indictment.

First, the prosecution brought out a series of loans that Mr. Facer had obtained some nine months prior to the time charged in the information.

It was never entirely clear as to why the prosecution brought up evidence of the loans as there is no evidence as to why the loans were obtained or the use the loan proceeds were put to. However, the evidence was more prejudicial than merely the fact that the defendant could not live on his particular income, but required borrowing. It came out into evidence that the loans were secured by the defendant's home in Salt Lake City which had been placed into his son's name. The reason the home was in his son's name was not clear. On page 329 of the transcript, the following dialogue occurs:

Q. All right, did you have occasion to raise some money for Mr. Facer in August of 1973? (that is meant to be 1972).

A. I did.

Q. And did he ask you to do that?

A. He discussed trading money and I suggested one thing that we could do, I had done business with the Murray First Thrift and I suggested there a possible means of raising money.

Q. And did you raise some money for him there?

A. Yes, I did.

Q. Approximately what date did you obtain a loan from there?

A. It was the later part of August of 1972.

Q. All right, what was used as security for that loan?

MR. LEEDY: I'm going to object, I don't see the relevancy of this.

COURT: Overruled.

Q. How much of a loan did you obtain there at Murray First Thrift?

A. The basic amount was $35,000 with costs included in that amount. It was -- the net amount was possibly, after deductions, and so forth, against it, other loans, some $25,000.

Q. Do you recall what was used as security for that loan?

A. The home that was in his boy's name at 1500 Princeton Avenue in Salt Lake City, Utah.

Q. That was the defendant Jack Facer's home?

A. The one he was living in.

Q. And that was in his boy's name?

A. I imagine so, because the loan had to be made out in that fashion. (RT-330).

Some Great Northern stock was also used to collateralize that loan, but it was in no way pointed out how that security or any attribute of the transaction was in any way relevant

to the case against the defendant. And the prosecution did not stop there. On page 335 of the transcript the following questioning and answering took place.

> Q. And I ask you, have you ever had an opportunity to raise additional money for Mr. Facer subsequent to the first loan you obtained for him?
>
> A. Yes, I did raise $5,000 for him.
>
> Q. And when was that?
>
> A. Possibly April.
>
> Q. Of 1972?
>
> A. Right.
>
> Q. So that was before the first loan you got on his house?
>
> A. Right.
>
> Q. Now, subsequent to the loan that you obtained on his home, did you have occasion to raise more money for Mr. Facer? . . .
>
> A. I was approached by Mr. Facer for an additional loan on his boy's house up on the east side and I also went to Murray First Thrift and arranged for another loan but in the sum of approximately $25,000, $20,000.
>
> Q. All right.
>
> MR. LEEDY: May I have a continuing objection to all testimony concerning the loans.

Again, there could have been no possible relevance to the charges that on three occasions he had borrowed money and two of such times he had used as security for the loan a home on Princeton Avenue which was in a son's name. Such evidence was not only irrelevant and immaterial, but designed solely to prejudice the defendant.

Additionally, the testimony about other losses that he had caused to a particular person which were not involved in

the charges in this indictment was irrelevant and prejudicial.

For example, Clifford Hughes testified as to losses that the defendant had caused to him in dealings in January of 1973 at the brokerage firm of Transamerican Securities. On page 180 of the transcript, the witness Hughes testified:

Q. And, can you please tell us when Mr. Facer first approached you about buying stock?

A. I couldn't give you the exact date, he had bought some through one of the houses in town prior to 1973 and I believe that he bought some in '72, I'm not positive of that without looking actually back to their records and looking.

Q. What company was that?

A. Transamerican.

Q. And did he ask you to do anything in particular with that company?

A. He just asked if it was all right if he bought and sold stock through one of my accounts and I said yes.

. . . on page 185 of the transcript:

Q. Did you lose any other money as a result of your transactions with Jack Facer during this period of time?

A. Yes. Mr. Facer had asked me to contact Von Jenson who was a trader at Transamerican and tell him to maintain the price of the stock and that he would make sure the price stayed up there, which I did and when the price fell, Duane Jenson, the owner of Transamerican just put all of the stock in the account of Transamerican into my account . . .

MR. LEEDY: I'm going to object. I don't know what this has to do with the defendant or this lawsuit.

COURT: Well you might be getting a little far afield at this time in connection with it.

MR. RANDLE: Silver Gull is one of the securities?

A. I understand that.

MR. LEEDY: What day are we talking about?

MR. RANDLE: Mr. Hughes suffered other losses on other transactions with Jack Facer at Transamerican Securities because of this other.

COURT: Well go ahead. Objection will be overruled.

And the examination continued on about losses that were suffered by Cliff Hughes at Transamerican Securities none of which was alleged in the information all occuring months prior to the time that was alleged in the information.

Additionally, the Court allowed in evidence about a loss, by a person other than a named victim, at a time other than alleged in the information, in a stock other than charged in the information. See RT-339 quoted at page 21 of the brief.

Additionally, the Court was continually erring in its hearsay rulings. On page 71 of the transcript the following question, objection, and ruling occurred:

> Q. Why did you sell those stocks?
>
> A. The NASD was in our office and there was -- they said that the values of that collateral . . .
>
> MR. LEEDY: I object to what the NASD told him, hour Honor, objection on hearsay.
>
> MR. RANDLE: It is not hearsay if he explains his motivation for doing it.
>
> COURT: Overruled.

Throughout the testimony of Mr. Mawod the prosecution attempted to elicit conversations between Mawod and Shields. The defendant objected on grounds of hearsay, but the prosecution proferred that they would somehow tie the matter in and would show that Shields was an agent of Facer. All such conversations were then allowed in subject to a motion to strike. The hearsay problems started on page 35 of the transcript when the following examination of Mr. Mawod, the prosecution's first witness, occurred:

> A. And what, if anything, did he (Shields) say at the time you contacted him?
>
> MR. LEEDY: Objection, hearsay.
>
> COURT: Sustained

MR. RANDLE: We'll show and connect up Mr. Shields as acting as an agent for Mr. Facer, I think anything that Mr. Shields is saying to anybody ought to be admitted into this case because he is authorized by Mr. Facer to conduct these transactions and we will so connect that up.

COURT: Well, the objection will be overruled subject to a motion to strike if you don't.

Shortly thereafter, the following occurred.

Q. Did you have a conversation with him (Shields) about the checks?

A. Yes sir.

Q. What, if anything, did you say and what did he say?

MR. LEEDY: If it please the Court may I have a continuing objection so that I don't need to keep interrupting on both grounds of hearsay and foundation.

COURT: You may, foundation.

MR. LEEDY: Foundation primarily, haven't shown Shields as any sort of an agent of Mr. Facer.

COURT: You may have a continuing objection.

From that point on the Court allowed into evidence any conversation that the witness Shields had with any other person.

In totality, the evidence shows that Mr. Facer and Mr. Shields were interested in similar stock and that they had some transactions together. However, in no sense could the evidence be construed to show that Shields was the agent of Facer so that his conversations bound Facer. Mr. Shields described the relationships thusly. At page 374 of his transcript, he testified:

Q. But this is true is it not, at the point when he first ask he (Facer) first ask you if he could use your account, that you knew he was extended and that's why he ask you, isn't that right?

A. Not necessarily.

Q. Isn't that what you testified previously to?

A. The only thing of it is see, is he needed -- I voluntarily -- we had been friends for some time so I let him go ahead and do it. (Use Shield's account at Mawod's). Why shouldn't I do it, we were working together.

Q. I wanted to hear you were working together. Were you not?

A. We done different things together, I had known him for some time. I was not a partner of his, but I believed in Great Northern, I liked Great Northern so I done what I done.

Q. Isn't it true Mr. Shields that Jack Facer came to you and said Great Northern, I still think it's a good buy, but I have bought all that I can and now could I use your account?

A. Now, it didn't happen in that manner, Jack Facer ask me can he buy in my account, in mine. I said Jack, this is fine if you have got the money to pay for it. He assured me that he did have.

The totality of the evidence shows the above to be the relationship between Mr. Facer and Mr. Shields. Such could not be construed to be an agency relationship whereby the conversations of Shield's are admissible against the defendant Facer -- particularly in a criminal proceeding. See Rule 63(8) Utah Rules of Evidence. Nor would such fall within the exception found in Rule 63 (9)(b), Utah Rules of Evidence as the hearsay statements were after the complete execution of the so-called scheme. Also, the prosecutor indicated his belief in the declaror's innocence (RT-402). Shields was not a party to the proceeding at the time his conversations with Mawod were brought into evidence because the State -- believing his innocence, see RT-402 -- had dismissed charges, therefore, such evidence was not admissible under Rule 63 (7) Utah Rules of Evidence.

Pursuant to the Court's suggestion at the close of the evidence, defendant's counsel moved to strike all that testimony (RT-478). Although the Court never formally ruled on the motion, it submitted the trial to the jury without an instruction as to striking the testimony and, therefore, for all intents and purposes did deny the motion. During such hearsay testimony, the jury heard such prejudicial evidence as:

> A. Yes, it was a suprise to me that Barbara Facer's name was on the check, and I pointed this out and I started to make -- I made inquiry at that point as to why her name was on the check.
>
> Q. What did Mr. Shields say? (RT-37)
>
> A. Well, he said that if I recall the first conversation that that's where the money was coming from and that the check would be made good (RT-37).
>
> Q. Which conversation was that?
>
> A. Well, I don't recall what sequence, but it was the, the stories about the same in each of these meetings that I had with Mr. Shields in that he assurred me that it would be taken care of an each time he made me aware that Mr. Facer was involved and was going to . . .

Objection was sustained at that point and a motion to strike was not granted. (R-39). . .

> A. And, yes, I think Gaylene was there, however, if I remember he called me on the phone so he informed me that a meeting was to be arranged and an attorney by the name of Summerhays, offices of, Mr. Facer was going to be there with some people and that they were going to attempt to straighten the whole thing out . . . (RT-45).

Exhibits were received in the same fashion. On page 100 the prosecution offered exhibits which had only been identified by the witness based on his dealings with Shields:

> Q. At this time, your Honor, we would like to offer exhibits into evidence as State's proposed Exhibit

16, 16A, 16B, 17 and 17A, 18 and 18A, and 18B and 19 and 19A, 20, 20A, 21 and 21A, 22 and 22A, 23 and 23A, 24 and 24A, 25 and 25A, and 14 and 15.

MR. LEEDY: Objection, your Honor, on the grounds that there is no connection with the defendant Facer.

COURT: Objection sustained.

MR. RANDLE: We will connect it up, your Honor. I think that Mr. Shields will adequately show as well as all these matters that he was clearly acting as an agent for Mr. Facer and performing these transactions for him. On the basis of the profer we will again request that it be admitted into evidence.

. . . .

COURT: Well as to any of the exhibits that pertain to Mr. Robertson, the Court will sustain the objection. As to those exhibits which pertian to Mr. Shields, the exhibits will be admitted subject to being striken if he does not connect the matter up and we will have to segregate them because I don't know. (RT-100-101).

Also evidence was elicited about instructions from Shields to William Birkinshaw (RT-263).

It is submitted that the admission into evidence -- as shown above-- of the following was erroneous:

1. The defendant secured three separate loans some ten months prior to the time alleged in the indictment and his home was used to secure two of the loans.

2. The defendant's home was in his son's name.

3. Evidence that some persons bought stock and lost money in American International Travel because the merger didn't go through.

4. Evidence that same year before the time charged in the indictment Great Northern was a shell corporation.

5. Evidence that there was a rapid rise in the market price for Great Northern Corporation beginning 10 months before the time alleged in the indictment.

6. Evidence that the SEC suspended trading in Great Northern stock some two months before the time charged in the indictment.

7. Evidence that other people at different times lost money in other transactions with the defendant.

8. Hearsay testimony indicating defendant was responsible for transactions in accounts at Mawod & Company and Heymond-Christiansen.

Defendant submits that each of the above was prejudicial and improper and the cumulative effect requires a reversal pursuant to Rule 4, Utah Rules of Evidence.

POINT IV

THE COURT ERRED IN REFUSING TO GRANT THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AND FOR ARREST OF JUDGMENT ON THE GROUND THAT THE EVIDENCE BEFORE THE JURY IN THIS ACTION DID NOT PROVE THE COMMISSION OF A PUBLIC OFFENSE.

The information by the state is very general and couched in general language and difficult to determine the theory of the State's prosecution. However, from the Bill of Particulars the State has enumerated the acts of fraud that the defendant is charged with committing:

(a) The defendant Facer did cause the stock of Great Northern Corporation, West Am and Silver Gull to be bought and sold, thereby creating an artificial market activity and price on said stock. (R-39),

(b) That the defendant executed the so-called float trade whereby cash was obtained at the selling broker of Continental Securities and the purchases at the remaining "victim" brokers was not required to be paid for for a period of seven days, (R-39),

(c) That the above was accomplished and hidden from the brokers involved by the use of nominees whose names were used without their knowledge and the brokerage houses were similarly unaware that the names used were, in fact, nominees. (R-38),

(d) That the defendant intended to pay for said purchases with insufficient funds checks.

It is the defendant's position that the prosecution failed to prove any of the above and that there was a reasonable doubt as a matter of law and that the motion for a directed verdict and subsequent motion for judgment for acquittal or arrest of judgment should have been granted.

With respect to the State's first alleged element of fraud; i.e., the float trades; the evidence was, as pointed out before, the so-called victims either knew the trades in question were float trades or acknowledged that the float trades were common part of the industry.

With respect to the second element of the alleged fraud, i.e., the use of nominees, when in fact, the nominees did not know they were being used and the brokerage firm for the nominees being used did not know in fact that such persons were nominees: The evidence was completely to the contrary. Not only did the nominees know that they were being used, but the brokerage firms knew, in fact, that such persons were nominee accounts.

With respect to Mawod, and Heymond-Christiansen the use of Bob Shields' account stated he was liable for the account; the same is true with respect to the Clifford Hughes account at Mountain States Securities. Also Hughes and Shields placed all the order themselves.

The third indicia of fraud, according to the state, was the manipulation of the market price of Great Northern, Silver Gull, and West Am Corporation stock. There was absolutely

no evidence of any kind with respect to manipulation of West Am or Silver Gull Corporation. The prosecution, indeed, did bring into evidence a substantial amount of trading activity by the defendant and several brokerage firms in Salt Lake City. They contended that large trading activity was evidence of manipulation. However, such evidence proves absolutely nothing unless there is evidence of the total trading activity in Great Northern stock in all brokerage firms in the United States. Without such evidence, we don't know that Mr. Facer's trading activity was substantial in comparison to the total trading activity. If it was not, it obviously would not have any effect on the market value. Other than on the fact that Mr. Facer traded heavily in Great Northern stock there is no evidence to show that he manipulated the market. Therefore, the State's third indicia of fraud has totally failed. In fact, the evidence of Great Northern's market price showed that from January of 1973 through the period in question, the price was fairly stable with only a slight decline. Thereafter the price fell sharply. However, during the time claimed in in the information, the market was stable.

Market manipulation is an essential part of the prosecution's case. Without proof of manipulation, there is no proof that the defendant caused or intended to cause any loss to the alleged victims. The purchasing brokerage firms (victims) still retained possession of the stock after the insufficient funds checks were returned, and under brokerage firm rules, they had the

right to keep or sell the stock. If the price were the same, there would be no loss; if the price moved down, there would be a loss; but if the price moved up, the so-called "victim" would have made a profit. For example, defendant Facer sells 1,000 shares of Great Northern through Continental Securities at a price of $3.00 per share. On the same day at the same time, through a nominee account at M. L. Fallick & Company, he purchases 1,000 shares at $3.00. That's the "cash trade". However, he collects immediate cash from Continental of $3,000 less commission. At this point he has $3,000 and owes M. L. Fallick $3,000, and M. L. Fallick has the 1,000 shares of Great Northern. Under brokerage firm rules, he has seven days to pay Fallick. Now at the end of seven days, Birkinshaw or Shields gets bad checks from Facer's wife and delivers them to Fallick. At this point Fallick merely deposits the checks, but will not turn over the stock until it determines the check is good. Since the check was dishonored, Fallick retains the stock. If the price is still $3.00 Fallick has not lost anything. Therefore, to prove a scheme to defraud, it is essential that the prosecution prove manipulation. There proof failed.

The fourth and final allegation of the scheme to defraud was the use of bad checks to pay for the nominee accounts. Again, it should be pointed out that these check were Barbara Facer's checks which in no way could be said to be used to conceal the identity of the true persons behind the accounts. However, these checks were given some five to seven days after

the purported purchase. The brokerage firm gave absolutely nothing in reliance upon said checks. It is difficult to conceive the bad checks would become a part of the scheme to defraud, but additionally, Mr. Jack Facer was out of Utah at the time the checks were obtained from his wife and tendered to the broker who alleged to be a victim. Incidentally, the checks were obtained by and delivered by the so-called victim William Birkinshaw and witness Shields. The evidence was conclusive that at the time in question Mr. Facer did not know Mr. Birkinshaw had obtained checks from his wife and delivered them to the brokers.

In view of the totality of the evidence, it seems that there was no deceit or deception on the part of the defendant and no reliance or intended reliance which are essential requirements for fraud and that while the evidence may show bad judgment in executing the so-called "float trades" and it may show civil liability by the failure to pay for the purchase in no sense can the State show the public offense of stock fraud. The case should be reversed and the charges against the defendant should be dismissed.

Respectfully submitted,

RICHARD J. LEEDY